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In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment bar retrial of a criminal defendant when a mistrial is declared on the defendant's motion, based upon a prosecutor's improperly-phrased question, which is prejudicial to the defendant, but which is asked in good faith and without intent to provoke a mistrial?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Oregon Court of Appeals reversing defendant's conviction (Petition for Certiorari, at 12-16) is reported at 49 Or. App. 415, 619 P.2d 948 (1980). The order of the Oregon Supreme Court denying the State's petition for review of the court of appeals' decision (Petition for Certiorari, at 17) is officially reported at 290 Or. 551 (1981). It is not reported unofficially in the National Reporter System.

JURISDICTION

The decision of the Oregon Court of Appeals was entered on November 24, 1980. The Oregon Supreme Court denied a timely petition for discretionary review on March 4, 1981. The State's petition for a writ of certiorari was filed on May 4, 1981, within the 60-day period prescribed by Rule 20.1. The Court's jurisdiction is based on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No Person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

United States Constitution, Amendment XIV, § 1:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Defendant Kennedy was charged, in the Circuit Court for Multnomah County, Oregon, with theft in the first degree. The charge was predicated on the theory that he misappropriated a Kashan Persian rug, valued at several thousand dollars, which he had purchased for his business associate, Benjamin Aryeh, using funds provided by Aryeh. (J.A. 2; Tr. 5-10).[1]

Trial began on February 27, 1980. A jury was empaneled; opening statements were made; and two witnesses were called by the State to identify two exhibits: a photograph defendant had sent Aryeh, depicting a rug he had allegedly purchased for Aryeh, and a rug which defendant had told the police was his own. (Tr. 4-20).

The State then called Otto Ewaldsen, an expert on Middle Eastern rugs, who testified that the rug depicted in the photograph defendant had sent Aryeh was the same rug defendant had claimed as his own, and that the value of the rug, in its present condition, was three to four thousand dollars. (J.A. 10; Tr. 28). Defense counsel began his cross-examination of Ewaldsen by inquiring into the witness' possible bias toward the victim, Aryeh, based on their prior business deal-

[1] In this brief, "J.A." refers to the joint appendix; "Tr." refers to the transcript of Kennedy's first trial, which began on February 27, 1980; and "M. Tr." refers to the transcript of the hearing on Kennedy's motion to dismiss, held immediately prior to his second trial, which began on March 17, 1980.

ings. (J.A. 14-16; Tr. 32-33). He then inquired into the possibility that Ewaldsen was biased against defendant, as evidenced by the fact that Ewaldsen had filed a consumer-protection complaint against defendant some years before, which the local district attorney had not pursued:

"Q: [Mr. Elliott]: Mr. Ewaldsen, did you not file or try to file a complaint with the district attorney's office in Medford, Oregon against Mr. Kennedy a number of years ago because he was a competitor of yours down there?

"A: [Mr. Ewaldsen]: No, I did not. Against Mr. Kennedy?

"Q: Did you file against Mr. or Mrs. Kennedy or their business venture down there?

"A: No, I did not file. I caused an inquiry to be started.

"Q: Well, did you file a complaint with the district attorney's office down there in which you charged them with fraudulent advertising?

"A: I believe we did. It's been a long time ago.

"(Counsel approached the witness.)

"Q: Is that your handwriting?

"A: Yes, and it's my signature and since you've introduced this, I would like an opportunity to explain it.

"Q: Well, you —

"A: In other words, the whole document —

"THE COURT: Just a minute. He'll handle the questions, you handle the answers.

"Q: [Mr. Elliott]: Mr. Ewaldsen, after you went to the district attorney's office and filed this complaint against Mr. and Mrs. Kennedy or their business, nothing came of it, did it?

"A: No. I never met Mr. Kennedy. I didn't know — I mean, I never met him.

"Q: I didn't ask you whether you met him, Mr. Ewaldsen. I asked whether or not anything came of your complaint filed with the district attorney's office down there?

"A: The district attorney did not pursue it." (J.A. 16-17; Tr. 34-35).

Later, on redirect examination, the prosecutor attempted to establish that Ewaldsen did not know defendant personally, and had not filed the complaint against him out of bias, but only out of a belief that defendant's advertising was misleading. The trial court sustained a series of objections to this line of questioning by defense counsel. (J.A. 18-23; Tr. 61-66). The Oregon Court of Appeals characterized these objections as "not well taken." (Petition for Certiorari, at 13; 49 Or. App. at 417; 619 P.22d at 949). The prosecutor ultimately asked:

"Q: Have you ever done business with the Kennedys?

"A: No, I have not.

"Q: Is that because he is a crook?" (J.A. 18-23; Tr. 61-66).

Defense counsel immediately moved for a mistrial and a resetting of the case for a new trial. (J.A. 24-25; Tr. 67-68). Over the prosecutor's objection that her question was only intended to explore the issue of bias which had been raised by the defense, the judge granted the motion for mistrial, commenting that he thought that the question was improper in form and

went beyond the limits of proper redirect examination. (J.A. 25-29; Tr. 68-71).

After the court had entered its order allowing defendant's motion for mistrial and ordering the matter reset for trial (J.A. 30), defendant moved for an order dismissing the case on the ground of former jeopardy. (J.A. 31). At the hearing on defendant's motion, the prosecutor testified that she had not asked the question, "Is that because he is a crook?" with the intention of causing a mistrial. On the contrary, her entire line of questioning had been intended to inquire into the subject of the witness' bias toward the theft victim and against defendant, a subject brought up by defense counsel on cross-examination. The prosecutor also testified that her questioning had been influenced by the fact that the witness had told her that he thought the defendant was unprofessional, or less than honest in his business practices. (J.A. 41-43; M. Tr. 11-12). She acknowledged the improper form of the last question she had asked the witness, but argued that her lack of intent to cause a mistrial was evident from the vigor with which she had resisted defendant's motion for mistrial. (J.A. 49-50; M. Tr. 19-20).

The judge to whom defendant's case had been assigned for retrial denied the motion to dismiss, finding for the record that there was no bad faith, intentional impropriety, or gross negligence on the part of the prosecutor, as follows:

". . . The issue before the Court is whether or not the conduct in this matter was intentional, overreaching or in bad faith, and as the Court has reviewed the portion of the transcript which you have attached to your motion and has listened to your explanation of the circumstances of how this matter arose, it seems apparent that the objectionable statement was made in the course of an attempt to clarify matters which had been brought out on cross-examination, and this, of course, is a proper function of redirect examination.

"I have reviewed the transcript and the wording, as put, and I would agree that the question was improper as put. I do not find, however, that it constitutes bad faith or was intentional impropriety. The question of whether or not it constitutes overreaching is one of those gray areas where we have to determine what 'overreaching' means, and in looking to the case which the defense has cited, *United States vs. Kessler,* [530 F.2d 1246 (5th Cir. 1976)], prosecutorial overreaching is there defined as being such as must have been a result of gross negligence or intentional misconduct which prejudiced the defendant so that he cannot receive a fair trial, and I wouldn't find that the overreaching or the erroneous conduct in this matter reaches that degree of aggravation. I don't think it amounted to gross negligence or intentional misconduct.

"The Motion for Mistrial [*sic*] will be denied. The Motion for Dismissal of the Indictment will be denied, and we will proceed to trial." (J.A. 52-53; M. Tr. 22-23).

On defendant's appeal from his subsequent conviction, the Oregon Court of Appeals acknowledged that it was bound by the trial court's findings of fact concerning the prosecutor's intent. Nevertheless the

court characterized the prosecutor's conduct as "flagrant overreaching," charged the prosecutor with the knowledge that her "commenting question" "was certain to interfere with the trial process," and held that defendant's motion to dismiss on the ground of former jeopardy should have been allowed. (Petition for Certiorari, at 14-16; 49 Or. App. at 418-419; 619 P.2d at 949-950).[2]

SUMMARY OF ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, protects against the harassment, embarrassment and risk of successive prosecutions for the same offense. It is not a sanction to be applied for the punishment of prosecutorial or judicial error short of intentional misconduct calculated to cause a mistrial. When a crimi-

[2] It is apparent that the court of appeals based its decision exclusively upon the Double Jeopardy Clause of the United States Constitution. No mention was made of the parallel provision in the Oregon Constitution, Art. I, § 12. The court's opinion relied upon federal decisions except for one Oregon case, *State v. Rathbun*, 37 Or. App. 259, 586 P.2d 1136 (1978), *reversed on other grounds* 287 Or. 421, 600 P.2d 392 (1979). The Court of Appeals cited *Rathbun* as being in "[a]ccord" with the holding of *United States v. Dinitz*, 424 U.S. 600, 611 (1976), that "* * * retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is 'motivated by bad faith or undertaken to harass or prejudice' the defendant."

Significantly the court of appeals in *Kennedy* cited to its own opinion in *Rathbun* and noted that it had been *"reversed on other grounds"* by the Oregon Supreme Court. In fact, the court of appeals' version of *Rathbun* relied entirely upon the federal constitutional provision and, as in *Kennedy*, failed to make any mention of the Oregon Constitution. The "other ground" upon which *Rathbun* was reversed by the state supreme court was Or. Const. Art. I, § 12, upon which the court elected to rely, rather than "guess" how this Court would intepret the Fifth Amendment. 287 Or. at 431-432, 600 P.2d at 397. It is therefore obvious that *Kennedy* is grounded solely on the federal constitution.

nal defendant seeks a mistrial because of error which, in the defendant's judgment, has infected the fact-finding process, there is generally deemed to be a waiver of any claim that reprosecution is barred. However, the prosecution should not be permitted deliberately to short-circuit a trial. Regardless of whether such deliberate action is undertaken to harass the defendant through successive prosecutions or to gain a tactical advantage on retrial, it violates the substantive right which is embodied in the jeopardy clause and reprosecution under such circumstances is barred.

This Court has never expressly held that, in this context, jeopardy only attaches when a mistrial is deliberately induced. However, such a rule has been clearly implied whenever this Court has, even incidentally, addressed the problem. Consistent with this Court's decisions, a substantial majority of lower courts have adhered to a rule requiring a showing of purposeful misconduct calculated to force a mistrial.

Although a few lower courts, most notably the United States Court of Appeals for the Fifth Circuit, have held that error caused by the "gross negligence" of the judge or prosecutor can bar a retrial, such a rule is not supported by the history or purpose of the jeopardy clause or by the decisions of this Court. Application of a gross negligence standard leads to a wholly subjective inquiry into minute degrees of blameworthiness of the prosecutor. It thereby converts

the jeopardy clause into a remedy for untoward prosecutorial conduct at the expense of the public's interest in seeing the proper retrial of accused persons proceed to a final determination of guilt or innocence.

Like the gross negligence standard, the standard used by the Oregon Court of Appeals, if adopted as the federal norm, will create disruptive uncertainties in the criminal trial and appeal process. Unlike other areas in which constitutional policies may require application of essentially punitive techniques to counter official misconduct, here there exist fully adequate disciplinary and corrective mechanisms to protect both the rights of defendants and the integrity of court processes.

Moreover, the mistrial occasioned by the prosecutorial conduct examined here did not protect a constitutional value independent of the Double Jeopardy Clause. There might be instances where a prosecutor's improper conduct contravenes fundamental due process rights, by, for example, the prosecutor's improper reference to suppressed evidence or a defendant's failure to testify. But the conduct complained of in this case goes only to non-constitutional issues concerning the form of questions permitted by state law and appropriate procedural techniques for direct and cross-examination.

The question of the prosecutor which prompted the mistrial in this case was admittedly improper in form.

But it was asked in the heat of trial after the prosecutor's legitimate attempt to rehabilitate an impeached witness had been frustrated by erroneous evidentiary rulings by the trial judge. The circuit court which heard the evidence on defendant's jeopardy motion specifically found that the prosecutor was not seeking to cause a mistrial and that her improper question was posed in good faith. These factual findings are amply supported by the record and they are dispositive of this case.

ARGUMENT

A. *Introduction*

It is a general, almost self-evident, rule that a motion by the defendant for mistrial ordinarily removes any barrier to reprosecution, even if the defendant's motion is prompted by prosecutorial or judicial error. *See United States v. Jorn,* 400 U.S. 470, 485 (1971). In *Jorn,* however, the Court suggested that an exception to this general rule exists where the motion is prompted, not merely by prosecutorial or judicial "error," but by prosecutorial or judicial "overreaching." *Id.*

In defining the degree and kind of conduct which constitutes overreaching sufficient to bar reprosecution on double-jeopardy grounds, it is important to note that, as was observed in both the opinion of the Court and the dissenting opinion of Justice Powell in *Crist v. Bretz,* 437 U.S. 28 (1978), the constitutional

guarantee against double jeopardy was derived from the English common law concerning pleas in bar. Originally, application of the doctrine was restricted to cases in which there had been a complete trial, culminating in acquittal or conviction. However, during the 19th and early 20th centuries, the concept of double jeopardy was extended in this country to cases in which the jury was discharged prior to verdict without the consent of the defendant. In a series of decisions, the Court held that jeopardy would apply in this context, in the absence of a "manifest necessity" for aborting the trial, such as inability of the jurors to agree on a verdict, *e.g., United States v. Perez,* 22 U.S. (9 Wheat.) 579 (1824); juror bias, *e.g., Simmons v. United States,* 142 U.S. 148 (1891); juror disqualification, discovered subsequent to empanelment, *e.g., Thompson v. United States,* 155 U.S. 271 (1894); or other procedural deficiencies, *see, e.g., Lovato v. New Mexico,* 242 U.S. 199 (1916).

The exact point at which the law of double jeopardy was extended is unclear;[3] and that question is largely academic, since there can be no doubt at this time that the extension has been accomplished.[4] It is sufficient to note that, because of the extension, under American law, jeopardy attaches when the jury is empaneled

[3] Compare, for example *Crist v. Bretz,* 437 U.S. 28, 34 n. 10 (1978), with the suggestion in *Tabbs v. State,* 43 Md. App. 20, 21-22, 403 A.2d 796, 798 (1979), that the extension was not finally made until *Wade v. Hunter,* 336 U.S. 684, 688 (1949).

[4] *Crist v. Bretz,* footnote 3, *supra,*; *Wade v. Hunter,* footnote 3, *supra.*

and sworn, and not, as in English law, when a verdict is returned. Another consequence of the extension, more critical to the decision in this case, is that a separate, originally unrelated rule of common law has been imported into the law of double jeopardy. That rule, that juries are not to be discharged in the absence of the most compelling reasons therefor, is traceable at least to early Stuart days, when it was invoked to prevent the public prosecutor or a judge sympathetic to the Crown from aborting a criminal trial when an acquittal seemed likely, in order to reprosecute the accused under more favorable circumstances. *See Crist v. Bretz,* 437 U.S. 28, 42-43 (1978) (Powell, J., dissenting); *Arizona v. Washington,* 434 U.S. 497, 507 n. 2[illegible] (1978).

It is understandable, and perhaps even appropriate, that the protection of an accused's "valued right to have his trial completed by a particular tribunal," *Wade v. Hunter,* 336 U.S. 684, 689 (1949), should be subsumed in the Double Jeopardy Clause. Freedom from the harassment, embarrassment, and risk of successive prosecutions for the same offense is, in fact, the substantive right which is embodied in the clause. However, the engrafting of this common law protection gives rise to the need for subtle analytic distinctions. To protect against intentionally aborted trials, it is necessary to focus on the state of mind of the judge and prosecutor. No other aspect of double jeopardy law

calls for such an analysis. Once this leap is made, it is difficult to avoid making value judgments about the conduct which caused the mistrial. Rather than simply inquiring into *why* the act was done, a court finds it necessary to assign responsibility for the act. In this way, jeopardy is transformed from a unique constitutional value into an additional sanction, beyond the mistrial itself, which is imposed as a punishment for prosecutorial misconduct.

The common law rule which was incorporated into the American law of jeopardy was especially intended to prevent the state from manipulating the jury system so as to retry a defendant under more favorable conditions (*e.g.,* before a more sympathetic jury or with a better-prepared case). Moreover, "a provision like that of double jeopardy * * * is rooted in history and is not an evolving concept like that of due process," *Gore v. United States,* 357 U.S. 386, 392 (1958). Petitioner contends that the narrow aspect of double jeopardy law which is implicated in this case should be strictly limited to its original purpose. "Prosecutorial overreaching" should bar reprosecution following the declaration of a mistrial at the defendant's own request *only* when the prosecutor acts with a specific intent to invite or cause a mistrial. In other cases, the remedy of a mistrial is itself sufficient to protect the defendant from the prosecutor's error and to penalize the state for that error. If the defendant avails himself

of that remedy, this act should be deemed a waiver of any claim on his part that reprosecution is barred.

B. *Judicial Application of Double Jeopardy Protection in The Context of Mistrials Caused by Prosecutorial Misconduct*

1. *United States Supreme Court Cases*

This Court has never expressly held that when, because of prosecutorial misconduct, a defendant successfully seeks a mistrial, jeopardy attaches only upon an express finding that the prosecutor intended to short-circuit the trial. Nevertheless, at least since 1949, such a rule has been clearly implied whenever the Court, even incidentally, has addressed the problem.

In *Wade v. Hunter, supra,* this Court applied the Fifth Amendment's double jeopardy provisions to a case in which the original tribunal had been discharged prior to determining the guilt or innocence of the accused. Although acknowledging the applicability of the clause to such situations, Justice Black's majority opinion cautioned:

> "* * * The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed * * *." 336 U.S. at 688-689.

Having acknowledged that the public's interest in "fair trials designed to end in just judgments" would "in some instances" transcend a defendant's "valued right" to have the trial completed by the first tribunal, 336 U.S. at 689, Justice Black applied the manifest necessity rule first announced in *United States v. Perez,* 22 U.S. (9 Wheat.) 579 (1824).[5] Justice Black observed:

> "Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue a trial would defeat the ends of justice." 336 U.S. at 690.

Since its decision in *Wade v. Hunter,* this Court has consistently applied the "manifest necessity" standard to cases in which a mistrial occurs upon the Court's own motion or at the request of the prosecution and without the defendant's consent. *Gori v. United States,* 367 U.S. 364 (1961); *Downum v. United States,* 372 U.S. 734 (1963); *United States v. Jorn,* 400 U.S. 470

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[5] In *Perez* the Court upheld a trial judge's discharge of a deadlocked jury without defendant's or the government's consent, as a proper exercise of the court's discretion, observing:

> "* * * We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. * * *" 22 U.S. (9 Wheat.) at 580.

The *Perez* opinion is not only brief, it is barren of any mention of the Double Jeopardy Clause. Nor does it intimate that its recitation of the "manifest necessity" doctrine has constitutional applications. Indeed, this Court has since noted in at least one subsequent case that the decision merely resolved an administrative issue in the federal justice system which was not of constitutional dimension. *Crist v. Bretz,* 437 U.S. 28, 30 n. 10 (1978); *see also* dissenting opinion by Justice Powell, 437 U.S. at 44, nn. 7 and 8.

(1971); *Illinois v. Sommerville,* 410 U.S. 458 (1973); *Arizona v. Washington,* 434 U.S. 497 (1978).

As a general rule, when a mistrial has been obtained at defendant's request, or at least with his consent, this Court has not applied the manifest necessity analysis. Because of the defendant's complicity in the termination of the first trial, double jeopardy has been held not to bar retrial. *United States v. Jorn, supra,* 400 U.S. at 485; *United States v. Dinitz,* 424 U.S. 600, 607-608 (1976); *United States v. Sanford,* 429 U.S. 14, 16 (1976); *Lee v. United States,* 432 U.S. 23, 32-33, (1977); *United States v. Scott,* 437 U.S. 82, 93 (1978); *see United States v. Tateo,* 337 U.S. 463, 467 (1964); *Divans v. California,* 434 U.S. 1303, 1304 (1977) (per Rehnquist, J., in chambers, as Circuit Justice). However, in oft-quoted dicta from its majority opinion in *United States v. Jorn, supra,* this Court recognized the possibility that, under limited circumstances, a defendant's motion for mistrial would not foreclose assertion of double jeopardy as a bar to retrial. The tendency of some lower courts to "penalize" prosecutorial misconduct through application of the double jeopardy bar is traceable to comments in the *Jorn* majority opinion which were unnecessary to the disposition of that case.

In *Jorn,* a federal district court judge, on his own motion and without the consent of defendant or the

government, discharged the jury in the trial of a fraudulent income tax preparation case, because of his belief that prosecution witnesses had been improperly advised of their constitutional privilege against self-incrimination. 400 U.S. at 472-473. The case clearly involved the "manifest necessity" rule as applied to mistrials declared without a defendant's consent; and indeed, the court's analysis proceeded in that vein. 400 U.S. at 479-486. *Jorn* did not involve a mistrial sought at defendant's request. Nonetheless, the Court alluded to the "mistrial at defendant's request" exception to the jeopardy bar in its discussion of the parameters of the "manifest necessity" rule, commenting:

> "Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarly assumed to remove any barrier to reprosecution, *even if defendant's motion is necessitated by prosecutorial or judicial error."* 400 U.S. at 485. (emphasis added).

Thus, the Court clearly distinguished between prosecutorial "error" and prosecutorial "overreaching." Positing the reverse of the above proposition, the Court gave meaning to the distinction and defined overreaching. The Court noted:

> "Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial *impropriety designed to avoid an acquittal,* reprosecution might well be barred. *Cf. United States v. Tateo,*

supra, at 468 n. 3; * * *." 400 U.S. at 485 n. 12. (emphasis added).[6]

In contrast to the situations presented in *Tateo* or *Jorn,* the defendant in *United States v. Dinitz, supra,* had requested and obtained a mistrial. The trial court in *Dinitz* expelled defense counsel from the courtroom following his repeated improper comments during the opening statement to the jury. 424 U.S. at 602-603. The court thereupon gave defendant three options: recessing the case to permit appellate review of defense counsel's expulsion; continuation of the trial with two attorneys assisting in the preparation and trial as counsel; or declaring a mistrial to permit retention of other counsel. 424 U.S. at 604. Following a short recess, defendant, through one of his remaining attorneys, moved for a mistrial as "in his best interest." 424 U.S. at 604-605. The court of appeals, both in panel and later *en banc,* reversed Dinitz' second conviction, finding no manifest necessity for the court's expulsion of original trial counsel. 492 F.2d 53, 54, 504 F.2d 854 (5th Cir. 1974). The court of appeals reasoned that, although Dinitz had moved for a mistrial, the exclusion of his counsel left him no more than

[6]Footnote 3 in *United States v. Tateo, supra,* reads: "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain." Since *Tateo* involved retrial following a defendant's successful appeal of an involuntary guilty plea, this language, as well as that quoted above in *Jorn,* is clearly dictum.

a "Hobson's choice" and deprived him of his "valued right" to proceed before the first jury.[7] 492 F.2d at 59.

This Court overturned the court of appeals' ruling and specifically repudiated that court's application of traditional waiver concepts to mistrials sought in response to judicial or prosecutorial error, noting:

> "* * * [T]raditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error. [citations]. In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. *The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.*" 424 U.S. at 609. (emphasis added).

The *Dinitz* Court focused on the function of double jeopardy principles as applied to the mistrial/retrial situation:

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[7] As Judge Charles Moylan observed in his thorough explication of the issue of mistrial/retrial due to prosecutorial error (*Tabbs v. State, supra,* 43 Md. App. at 22, 403 A.2d at 798-799), the "valued right" phraseology first enunciated by Justice Black in *Wade v. Hunter, supra,* 336 U.S. at 689, embarked upon an evolution of its own:

> "*Wade v. Hunter, supra,* refers to it as a defendant's 'valued right to have his trial completed by a particular tribunal.' 336 U.S. at 689, . . . *United States v. Jorn,* 400 U.S. 470, . . . (1971), refers to it variously as a defendant's 'right to go to a particular tribunal,' the right of a defendant not to be 'deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal,' 400 U.S. at 484, . . .; as 'a command to trial judges not to foreclose the defendant's option,' 400 U.S. at 485, . . .; and 'the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate,' 400 U.S. at 486, . . .; *Downum v. United States,* 372 U.S. 734, 736, . . . (1963), refers to it as 'the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him.'"

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' *United States v. Jorn, supra,* at 485, * * * threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. *Downum v. United States,* 372 US, at 736, * * *. *See Gori v. United States,* 367 US, at 369, * * *; *United States v. Jorn, supra,* at 489, * * * (Stewart, J., dissenting); *cf. Wade v. Hunter,* 336 US, at 692, * * *." 424 U.S. at 611.

Conceding that the trial judge might have "overreacted" in expelling Dinitz' attorney from the proceedings, the Court nevertheless found no evidence, no contention, nor even a suggestion that "[his] action was motivated by bad faith or undertaken to harass or prejudice" the defendant. 424 U.S. at 611.[8]

In *Lee v. United States,* 432 U.S. 23 (1977), the prosecution determined in mid-trial that the indictment was fatally defective because it lacked an allegation of scienter. Although defendant's motion to dismiss the indictment on those grounds had tentatively been denied prior to trial, it was granted by the court after both sides had rested. This Court concluded that the motion to dismiss was "functionally indistinguish-

[8]Indeed, the Court apparently deemed significant the fact that the record reflected the trial judge's expectation that the trial would continue with one of the supporting attorneys as defense counsel. 424 U.S. at 611 n. 14.

able" from a mistrial request, for purposes of double jeopardy analysis, and noted that the usual means of correcting the error was a fresh start with a new trial:

> ". . . The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided — absent any double jeopardy bar — by beginning anew the prosecution of the defendant." 432 U.S. at 30.

Seeking to delineate which type of error might constitute the prosecutorial overreaching to which the Court had first alluded in *Jorn,* the *Lee* decision stated:

> "It follows under *Dinitz* that there was no double jeopardy barrier to petitioner's retrial *unless the judicial or prosecutorial error that prompted petitioner's motion was 'intended to provoke' the motion or was otherwise 'motivated by bad faith or undertaken to harass or prejudice petitioner* . . . . Here, two underlying errors are alleged: the prosecutor's failure to draft the information properly and the court's denial of the motion to dismiss prior to the attachment of jeopardy. Neither error — even assuming the court's action could be so characterized — was the product of the kind of overreaching outlined in *Dinitz. The drafting error was at most an act of negligence,* as prejudicial to the Government as to the defendant." 432 U.S. at 33-34. (emphasis added).

In *Divans v. California,* 434 U.S. 1303 (1977), the lower courts rejected the defendant's jeopardy claim following a mistrial which was allegedly caused by prosecutorial misconduct. Justice Rehnquist, sitting as a Circuit Justice, denied the accused's request for a stay of his second trial pending filing and disposition

of a petition for a writ of cetiorari. Citing the language of *Jorn, Downum,* and *Dinitz, supra,* the Justice noted that retrials are barred

> "* * * where 'bad-faith conduct by judge or prosecutor,' *United States v. Jorn,* [400 U.S.,] at 485 threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. *Downum v. United States,* 372 U.S., at 736. *United States v. Dinitz,* 424 U.S. 600, 611." 434 U.S. at 1303-1304.

Since the trial court found that the prosecutorial error which had prompted the original mistrial was not "committed * * * for the purpose of forcing the defendant to move for a mistrial," Justice Rehnquist found the jeopardy claim to be patently meritless and denied the stay. *Id.*

In a more recent opinion, this Court addressed the double jeopardy issues raised by the government's statutory right to obtain appellate review of sentences imposed on designated "dangerous special offenders." *United States v. DiFrancesco,* 449 U.S. 117 (1980). While plainly dealing with double jeopardy principles in a post-conviction rather than a mistrial/ retrial context, the Court's analysis in *DiFrancesco* is nevertheless pertinent to this case in several respects.

Cognizant of the current importance and vitality of the Double Jeopardy Clause as exhibited by the multitude of recent cases, the Court noted that its "application has not proved to be facile or routine [as]

demonstrated by acknowledged changes in direction or in emphasis. [citations]." 449 U.S. at 127. The Court drew a clear distinction between those cases in which the first trial has ended in an acquittal, to which the law attaches a particular significance, and affords absolute finality, and those cases in which the trial has not ended in an acquittal, where "[t]he result is definitely otherwise * * *." 449 U.S. at 129-130. With specific reference to the mistrial/retrial context, the Court noted that reprosecution would not be barred, if the mistrial, although obtained without defendant's consent, was occasioned by "manifest necessity" or, if the defendant had "successfully moved for a mistrial * * * *so long as the Government did not deliberately seek to provoke the mistrial request.* [citing *Dinitz, supra*]." 449 U.S. at 130. (emphasis added).

The foregoing discussion clearly demonstrates that, in the context of defendant-requested mistrials, the Court has focused on such error as is "designed to avoid an acquittal" *United States v. Tateo, supra,* 377 U.S. 468 n. 3; *United States v. Jorn, supra,* 400 U.S. 485 n. 12; or "bad-faith conduct" which threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict." *Downum v. United States, supra,* 372 U.S. at 736; *Gori v. United States, supra,* 367 U.S. at 369. Indeed, all of

the decisions in which this Court has, even tangentially, addressed the issue of prosecutorial or judicial impropriety as a possible jeopardy bar to retrial are replete with language branding the requisite error or impropriety as an intentional, deliberate act, consciously designed to provoke a mistrial, to avoid an impending acquittal, to gain a tactical advantage in retrial, or merely to harass or prejudice the defendant by successive prosecutions.[9]

2. *Majority Position — Lower Courts*

The vast majority of federal appellate courts have strictly construed the language of *Jorn* and its progeny in determining what types of improper conduct constitute "prosecutorial or judicial overreaching." Consistent with the clear implication of this Court's decisions, most federal courts require a showing that the offending judge or prosecutor intended to provoke a mistrial as a result of his or her conduct.[10]

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[9] *See, e.g.; "bad-faith* conduct," *United States v. Jorn, supra,* 400 U.S. at 485; "*designed* to avoid an acquittal," *United States v. Tateo, supra,* 377 U.S. at 468 n. 3; *United States v. Jorn, supra,* at 485 n. 12; "*intended* to provoke mistrial requests," "*motivated* by bad-faith or *undertaken* to harass or prejudice," *United States v. Dinitz, supra,* 424 U.S. at 609, 611; "for the *purpose* of forcing defendant to move for a mistrial," *Divans v. California, supra,* 434 U.S. at 1303; "*deliberately seek* to provoke the mistrial request," *United States v. DiFrancesco, supra,* 449 U.S. at 130. (emphasis added). In at least one decision, this Court has declined to bar reprosecution where the prosecutorial error precipitating the mistrial request was "at most an act of negligence." *Lee v. United States, supra,* 432 U.S. at 34.

[10] *See, e.g., United States v. Zozlio,* 617 F.2d 314, 315 (1st Cir. 1980); *Mitchell v. Smith,* 633 F.2d 1009, 1012 (2d Cir. 1980), *cert. den.* — U.S. —, 101 S.Ct. 879 (1981); *Drayton v. Hayes,* 589 F.2d 117, 121 (2d Cir. 1979); *United States v. Estremera,* 531 F.2d 1103, 1110 (2d Cir.), *cert. den.,* 425 U.S. 979 (1976); *United States v. Leppo,* 641 F.2d 149, 152-153 (3d Cir. 1981); *Govt. of*

(Continued on following page)

A clear majority of state appellate courts have similarly adhered to a rule requiring a showing of purposeful misconduct calculated to force a mistrial.[11]

3. *The Fifth Circuit Minority Position*

Although this Court has never suggested that unintentional, but "grossly negligent" misconduct consti-

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(Continued from previous page)

Virgin Islands v. Scuito, 623 F.2d 869, 872-873 (3d Cir. 1980); *United States v. Green*, 636 F.2d 925, 927 (4th Cir. 1980); *United States v. Weaver*, 565 F.2d 129, 133 (8th Cir.), *cert. den.*, 434 U.S. 1074 (1978); *United States v. Roberts*, 640 F.2d 225, 228 (9th Cir. 1981); *United States v. Zimmelman*, 634 F.2d 1237, 1238 (9th Cir. 1981); *United States v. Cox*, 633 F.2d 871, 876 (9th Cir. 1980); *United States v. Calderon*, 618 F.2d 88, 90 (9th Cir. 1980); *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir. 1981); *United States v. Pollack*, 640 F.2d 1152, 1155 (10th Cir. 1981); *United States v. Rios*, 637 F.2d 728, 729-730 (10th Cir. 1980); *United States v. Leonard*, 593 F.2d 951, 954 (10th Cir. 1979).

[11] *See, e.g., Piesik v. State*, 572 P.2d 94, 97 (Alaska 1977); *White v. State*, 523 P.2d 428, 429 (Alaska 1974); *Muller v. State*, 478 P.2d 822, 827 (Alaska 1971); *State v. Way*, — Ariz. —, 631 P.2d 139, 141 (Ariz. App. 1981); *State v. Marquez*, 113 Ariz. 540, 542-543, 558 P.2d 692, 695 (1976); *State v. Wright*, 112 Ariz. 446, 449-450, 543 P.2d 434, 438 (1975); *City of Tucson v. Valencia*, 21 Ariz. App. 148, 152, 517 P.2d 106, 110 (1973); *State v. Ballinger*, 19 Ariz. App. 32, 36, 504 P.2d 955, 959 (1973); *People v. Hathcock*, 8 Cal. 3d 599, 614 n. 14, 105 Cal. Rptr. 540, 550 n. 14, 504 P.2d 476, 486 n. 14 (1973), *overruled on other grounds* in *People v. Green*, 27 Cal. 3d 1, 164 Cal. Rptr. 1,609 P.2d 468 (1980); *People v. Ortiz*, 196 Colo. 438, 440, 586 P.2d 227, 228-229 (1978); *People v. Baca*, 193 Colo. 9, 14-15, 562 P.2d 411, 412 (1977); *Studyvent v. State*, 153 Ga. App. 161, 162, 264 S.E.2d 695, 697 (1980); *State v. Pulawa*, 58 Haw. 377, 382-384, 569 P.2d 900, 905-906 (1977), *cert. den.* 436 U.S. 925 (1978); *People v. Estrada*, 91 Ill. App.3d 228, 236, 414 N.E.2d 512, 517 (1980); *People v. Gomez*, 84 Ill. App.3d 785, 787-788, 406 N.E.2d 886, 888 (1980); *People v. Hill*, 34 Ill. App.3d 193, 197, 339 N.E.2d 405, 408 (1975); *People v. Handley*, 51 Ill.2d 229, 235, 286 N.E.2d 131, 135-136 (1972); *State v. Baylor*, 2 Kan. App. 2d 722, 725, 587 P.2d 343, 346-347 (1978); *State v. Cannon*, 383 So.2d 389, 395-396 (La. 1980); *Lee v. State*, 47 Md. App. 367, —, 423 A.2d 267, 269 (1980); *Bell v. State*, 286 Md. 193, 204-205, 406 A.2d 909, 915 (1979); *Tabbs v. State, supra*, ; *State v. Day*, 94 N.M. 753, 756, 617 P.2d 142, 145 (1980); *State v. Quintana*, 93 N.M. 644, 645, 603 P.2d 1101, 1102 (N.M. App. 1979); *Potenza v. Kane*, 79 App. Div.2d 467, —, 437 N.Y.S. 2d 189, 192 (1981); *State v. Jackson*, 33 Or. App. 139, 143-144, 575 P.2d 1001, 1003 (1978), *cert. den.* 440 U.S. 971 (1979); *Commonwealth v. Potosnak*, — Pa. Super. —, 432 A.2d 1078, 1081-1082 (1981); *Commonwealth v. Starks*, 490 Pa. 336, 341, 416 A.2d 498, 500 (1980); *Commonwealth v. Potter*, 478 Pa. 251, 266, 386 A.2d 918, 926 (1978); *State v. Copening*, 100 Wis.2d 700, 714-715, 303 N.W.2d 821, 829 (1981); *State v. Harrell*, 85 Wis.2d 331, 335, 270 N.W.2d 428, 431 (Wis. App. 1978).

tutes overreaching upon which jeopardy attaches, a small and now diminishing spate of decisions has succumbed to that view. The primary source of this unsupported and aberrant line of authority appears to have been, and to some extent still is, the United States Court of Appeals for the Fifth Circuit.

The phrase "gross negligence" first arose as dictum in the Fifth Circuit's opinion in *United States v. Beasley,* 479 F.2d 1124 (5th Cir.), *cert. den.* 414 U.S. 924 (1973). After holding that no showing of overreaching was made and that, therefore, a retrial was not barred, the court accurately noted that the type of error proscribed is "gross misconduct" designed to "precipitate a mistrial and therby gain 'another more favorable opportunity to convict the accused.' "[12] The court added:

> "* * * At the same time, *Wade v. Hunter, supra,* makes it clear that when a mistrial results from prosecutorial error which does not amount to *gross negligence or* intentional misconduct, the state is not barred from reprosecuting the defendant." 479 F.2d at 1126. (emphasis added).

Reference to Justice Black's opinion in *Wade v. Hunter* discloses no express or even implied allusion to

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[12] "It would be offensive to the fundamental constitutional guarantee against successive, oppressive prosecutions, if the government, at a trial in which its case is going badly, could by *gross misconduct* precipitate a mistrial and thereby gain 'another, more favorable opportunity to convict the accused.' " [citation omitted]. 479 F.2d at 1126. (emphasis added).

the term "gross negligence."[13] Thus, *Beasley's* subtle, yet significant transformation of "gross misconduct" into "gross negligence" was completely unsupported in the decisions of this Court.[14].

Following its *Beasley* decision, the Fifth Circuit reiterated "gross negligence" as a form of overreaching in a subsequent case, which was cited to and considered by the trial court in the case at bar. In *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976), the court held:

> "To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' *United States v. Dinitz* * * *." 530 F.2d at 1256.

Although *Dinitz* is apparently cited in the above passage as authority for the entire postulate, in fact, it only accounts for the final portion. As in *Beasley, supra, Kessler's* reference to gross negligence is

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[13] As Judge Moylan observed, in *Tabbs v. State, supra,* 43 Md. App. at 39-40, 403 A.2d at 407:

> "*Wade v. Hunter,* of course never mentioned 'gross negligence' and was, furthermore, a 'manifest necessity' case where a mistrial was declared by the court *sua sponte* and not an 'overreaching' case where the defense moved for the mistrial."

Referring to the Fifth Circuit's *Beasley* decision, Judge Moylan concluded:

> "That sort of thinking, researching, analyzing and writing is not precedential or persuasive authority for anything."

[14] The confusion evident in *Beasley* regarding this Court's definition of overreaching may have stemmed in part from the comparative dearth of decisions on the subject in 1973. *Jorn* had been decided two years before; *Dinitz, Lee, Divans,* and *DiFrancesco* came, of course, some years later.

created from whole cloth and is unsupported by the history or purpose of the Double Jeopardy Clause as articulated by this Court. Moreover, in *Kessler* as in *Beasley,* the court's discussion of gross negligence is wholly unrelated to the facts which were before the court. The prosecutor in *Kessler* was found intentionally to have elicited hearsay statements of a declarant whom he knew to be unavailable and to have introduced "false" and highly prejudicial evidence. The Fifth Circuit found this error to be *intentional* misconduct sufficient to justify application of a jeopardy bar, thus avoiding application of its own "gross negligence" standard. 530 F.2d at 1257-1258.

The Fifth Circuit has continued to assert its homegrown "gross negligence" standard in mistrial/retrial jeopardy cases. *See, e.g., United States v. Crouch,* 566 F.2d 1311, 1321 (5th Cir.), *reh. den.* 570 F.2d 949 (1978). However, recent decisions suggest that even that circuit may be retreating from its own theory. In *United States v. Garza,* 603 F.2d 578, 580 (5th Cir. 1979), for instance, while paying lip service to its "gross negligence" rule, the court stressed the presence or absence of "bad faith motivation" as the determinative factor in mistrial/retrial prosecutorial error cases and warned that if courts became too eager to find prosecutorial overreaching, the inevitable result would be to inhibit trial judges from granting mistrial motions, even when appropriate. This injection of the

"bad faith" concept in its recent decisions reflects an effort by the Fifth Circuit to temper its own distortion of the theory of jeopardy.

Other state and federal courts which originally adopted and applied the Fifth Circuit's "gross negligence" standard, have since rejected the doctrine and have returned, somewhat chastened, to the fold. The United States Court of Appeals for the Eighth Circuit, for example, applied the gross negligence standard to prosecutorial misconduct in *United States v. Martin,* 561 F.2d 135, 139 (8th Cir. 1977), but later converted, without fanfare, to the intentional "bad-faith" doctrine in *United States v. Weaver,* 565 F.2d 129, 133 (8th Cir. 1978) *cert. den.* 434 U.S. 1074 (1980). And in Pennsylvania, a veritable hotbed of prosecutorial misconduct/jeopardy cases, the state supreme court initially adopted the "gross negligence" rule in a plurality opinion in *Commonwealth v. Bolden,* 472 Pa. 602, 373 A.2d 90 (1977), but then swung back to the intentional misconduct school a year later. *Commonwealth v. Potter,* 478 Pa. 251, 260, 386 A.2d 918, 925-926 (1978). More recent Pennsylvania decisions seem to ensure that the pendulum will not swing back to the "gross negligence" rule. *See, e.g., Commonwealth v. Starks,* 490 Pa. 336, 341, 416 A.2d 498, 500 (1980); *Commonwealth v. Potosnak,* — Pa. Super. —, 432 A.2d 1078, 1081-1082 (1981).

The progressive decline of the "gross negligence"

theory in the jeopardy context is, in no small part, attributable to the utter subjectivity of the fact-finding process which the term necessitates. The concept of gross negligence has been criticized in tort law because it does not describe a *kind* of negligence but rather hints at a *degree* of negligence without defining the scale by which it is to be measured.[15] Because of the vagueness of the term, the Model Penal Code has abandoned any attempt to define it. Model Penal Code (U.L.A.) § 202 (1974). Resort to a "gross negligence" standard for determining whether jeopardy should bar a retrial because of the prosecutor's conduct defeats any effort to promote uniformity and consistency in the treatment of persons accused of crimes. Under this standard, determining whether a retrial is barred turns upon an unstructured judgment about the culpability of the prosecutor. Negligent transgressions which may be "gross" when committed by a seasoned

[15]Dean Prosser describes gross negligence as follows:

"As it originally appeared, this was very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring willful misconduct, or recklessness, or such utter lack of all care as will be evidence of either — sometimes on the ground that this must necessarily have been the intent of the legislature. But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *There is, in short, no generally accepted meaning*; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less than conscious indifference to consequences and that it is, in other words, merely an extreme departure from the ordinary standard of care." W. Prosser, Handbook of the Law of Torts § 34, at 183-184 (4th ed. 1971) (emphasis added).

veteran, might be perfectly understandable when the prosecutor is a green recruit. Yet the effect upon the defendant is the same in either case. Similarly, conduct which is denounced as "gestapo tactics" by one judge, may be viewed with tolerant understanding by another. The degree to which a prosecutor's conduct prejudices those interests which are protected by the jeopardy clause is not determined by its blameworthiness. Indeed, as a matter of history and constitutional policy, double jeopardy protections were not created as a means of punishing or correcting prosecutorial ineptitude.

Most courts have recoiled from the Fifth Circuit's "gross negligence" standard in apparent recognition of the illegitmacy of its claim to a Supreme Court pedigree. As Judge Orth of the Maryland Court of Appeals cogently observed in *Bell v. State,* 286 Md. 193, 204-205, 406 A.2d 909, 915 (1979):

> "The keystone of the test formulated and consistently followed by the Supreme Court is the requirement of 'intent.' And intent is implicit in 'bad-faith.' Thus, the test does not encompass negligence. *See Illinois vs. Sommerville,* 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). 'Intentional' and 'negligent' are mutually exclusive. It is true that the greater degree of negligence, the closer the error comes to being intentional. That is, an error by judge or prosecutor which appears to be 'gross negligence' may, of course, provide some evidence

> of intent. But if what seems to be negligent is so gross as to warrant a determination that the act was in fact intentional, it is not then negligent." (footnotes omitted).

Importation of the gross negligence standard to analyze the type of prosecutorial error which triggers double jeopardy protection is unwise, unjust, and constitutionally unwarranted. Because the standard is incapable of generalization into an understandable rule, its adoption would foment litigious appeals rather than resolve them. This Court will be asked to arbitrate, through essentially *ad hoc* jurisprudence, the appropriate degree and category of each separate incident of allegedly negligent prosecutorial or judicial error throughout the United States. To adopt the gross negligence standard would be to breathe new life into a doctrine which has been justifiably discredited for its imprecision and subjectivity in the area of its origin, the common law of torts. The so-called standard would shift the focus of inquiry from the question of prejudicial impact on defendants to the wholly separate and otherwise pointless examination of individual prosecutors' personal trial experiences, tactical choices and developed legal skills. This subject may be an appropriate inquiry of continuing legal education, or of psychoanalysis. It should not, however, be a foundational inquiry for a bedrock principle of constitutional law.

4. *Proposed Rule*

The majority of lower courts have recognized this Court's clear message that jeopardy should attach upon mistrial granted on the defendant's motion, only if there is a specific finding that the conduct of the judge or prosecutor was motivated by an intent to cause a mistrial and thus to subject the defendant to successive prosecutions.[16] It is unimportant whether the intent to short-circuit the trial is prompted by a vindictive desire to harass the defendant or by a calculated determination that a more favorable outcome could be achieved in a second proceeding.[17]

The purpose of the Double Jeopardy Clause is to protect the defendant from successive prosecutions: it is not to punish the prosecutor. The minority of lower

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[16]The apparent confusion evidenced by those courts adopting minority approaches stems in large part from the fact that, until now, the Court has never confronted the issue directly or in detail. Indeed, several courts have lamented the fact that heretofore the only pronouncements addressing the question are, regrettably, succinct, and clearly dicta. *See Tabbs v. State, supra,* 43 Md. App. at 25, 403 A.2d at 800; *State v. Copening, supra,* 100 Wis.2d at 713-714, 303 N.W.2d at 828; *People v. Baca, supra,* 193 Colo. at 13, 562 P.2d at 414; *State v. Day, supra,* 94 N.M. at 757, 617 P2d at 146.

[17]Several decisions by this and other courts have incorporated in their discussion of the prosecutorial overreaching issue a variety of phrases describing the subjective purpose(s) attendant to the prosecutor's misconduct. See, for example, the decisions of this Court cited in footnote 9, *supra.*

Although clearly illustrative of the possible motivations underlying a prosecutor's misconduct, such phrases are not dispositive of the only issue of constitutional consequence: did the prosecutor intend to provoke a mistrial? Intentional provocation of a mistrial, in and of itself, is sufficiently egregious to invoke jeopardy sanctions without delving into a needless psychoanalysis as to *why* the prosecutor intended the mistrial.

Indeed, inclusion of factors descriptive of a prosecutor's motivation in a definition of intent not only complicates and confuses the issue, but unjustifiably requires the accused to prove motive as well as intent. As elsewhere in the criminal law, motive may be probative on the issue of intent, but it should not be a separate element of proof.

courts which have sought to convert the jeopardy clause into a standard for evaluating prosecutorial conduct have failed precisely because the provision was neither designed for, nor is it properly susceptible to, such conversion.

However commendable the deterrent objective of a broader rule may be, the Double Jeopardy Clause was not designed to achieve that goal. Many other devices are readily available to chasten the prosecutor or to remove the taint of prejudicial conduct. In other contexts, such as the Fourth Amendment's prohibition of unreasonable searches and seizures, this Court has grudgingly imposed essentially punitive sanctions, such as the exclusionary rule, because there is no other effective means of ensuring official compliance. There is no similar necessity here.

In the first place, the declaration of a mistrial is itself the last in a range of remedies available to the trial court to cure the effects of prejudicial trial tactics. The court may also admonish the prosecutor or give a curative instruction. The decision as to an appropriate remedy is based upon the risk of prejudice, not the culpability of the prosecutor. If, in addition to the curative declaration of a mistrial, there is a perceived need to discipline the prosecutor, this can be accomplished by expulsion from court or the initiation of bar disciplinary proceedings. The Draconian remedy of dismissing unadjudicated criminal charges

should not be imposed when more direct and less publicly burdensome sanctions are available.

Moreover, under prevailing lower court tests which convert the jeopardy clause into a remedial dismissal mechanism, the sanction is imposed or withheld on the basis of fundamentally unverifiable judgments about the disapprobation which should attach to the prosecutor's conduct. The remedy is addressed to an undefined evil, not to a specific constitutional transgression. For example, in the present case, dismissal was deemed appropriate because the prosecutor "flagrantly" violated an evidentiary rule regulating the form of questions permitted on redirect examination. There is no suggestion that the prosecutor's conduct violated any constitutionally protected right of the defendant. Thus, through an expansive jeopardy analysis, procedural rules may be accorded greater protection than fundamental constitutional rights, if they are violated in a way which offends the subjective judgment of a reviewing court.

If dismissal on double jeopardy grounds is permitted to become an *ad hoc* sanction to be imposed whenever a prosecutor's conduct is deemed sufficiently offensive, the efficiency and fairness of the fact-finding process will be significantly undermined. The harshness of the remedy and its unpredictable application will undoubtedly make trial judges reluctant to grant mistrial motions, even in appropriate cases. This

Court has already specifically acknowledged that dire consequence. *See United States v. Dinitz, supra,* 424 U.S. at 610. The interests of the defendant and the public will thus be impaired by the needless and wasteful process of appeal and reversal. Ironically, an expansive application of jeopardy after mistrial would, in many instances, subject the defendant to more, rather than less litigation. *See United States v. Garza, supra,* 603 F.2d at 587.

Any jeopardy analysis which is predicated upon a subjective inquiry into the prosecutor's motivations will inevitably turn on unanalyzable, and therefore unreviewable epithets such as "gross negligence" or "overreaching." In contrast, determining whether a prosecutor *intended* to cause a mistrial requires only an examination of facts and circumstances. The determination of one's intent must generally be accomplished by inference, but the drawing of such inferences is a practice well known to the criminal law. Facts such as the severity of the prosecutorial misconduct, the point in the trial at which it occurred, the relative success enjoyed by the prosecution and defense up to that point, and the prosecutor's resistance to the mistrial request will all be pertinent to that factual determination. However subtle the inquiry may be, it is one which trial courts are accustomed to making.

This case presents an opportunity for the Court to

state directly and unequivocally that lower court expansions of the jeopardy concept in defendant-requested mistrial settings are inappropriate. The test in this context should be simply whether the prosecutor's conduct was intended to provoke a mistrial. This test avoids needless and hopeless psychoanalysis of prosecutorial motivation, degree of fault or amount of personal blameworthiness and focuses on a clear, determinable issue. In doing so it serves the historical origins and present constitutional rationale for the protection against double jeopardy.

C. *The Oregon Position*

1. *Decisional Law*

Oregon's uniquely errant interpretation of jeopardy principles first surfaced in the state supreme court's decision in *State v. Rathbun,* 287 Or. 421, 600 P.2d 329 (1979).[18] In that case, a mistrial was occasioned by improper remarks made by the court bailiff, in the presence of several jurors, during the trial and subsequent deliberations. Despite its recognition that the mistrial was not "triggered by prosecutorial or judicial desire to harass the defendant or afford the prosecution a more favorable opportunity to

[18] An earlier Oregon Court of Appeals decision, *State v. Jackson,* 33 Or. App. 139, 575 P.2d 1001 (1978), *cert. den.* 440 U.S. 971 (1979), correctly applied the *Dinitz* "bad-faith" or "intentional" standard to the overreaching issue. Notwithstanding defendant Kennedy's reliance on *Jackson* in the trial court (J.A. 38-39; M. Tr. 8), the court of appeals found "no basis for characterizing the prosecutor's conduct [in that case] as intentional misconduct, bad faith or overreaching." 33 Or. App. at 143, 575 P.2d at 1003.

convict," the Oregon Supreme Court held that retrial was nonetheless barred, stating:

> "The misconduct by this bailiff is so abhorrent to the sense of justice that we find the same sanction is required to effectuate the constitutional command as in the case where the prosecutor or the judge intends to provoke a mistrial. The state put this officer of the court in the position to wreak havoc and must bear the same burden as when its prosecutor or judge in like manner offends." 287 Or. at 432-433, 600 P.2d at 398.[19]

The case at bar involves a mistrial occasioned by prosecutorial misconduct in which the lower court found "as a matter of fact [binding on review] that it was not the intention of the prosecutor . . . to cause a mistrial." Petition for Certiorari, at 14; 49 Or. App. at 418; 619 P.2d at 949. In the course of its scant factual and legal analysis, the Oregon Court of Appeals acknowledged the import of this Court's prior declarations in *Jorn* and *Dinitz*:

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[19] Although, as we have already pointed out in footnote 2, *supra*, the supreme court's decision in *Rathbun* was based upon the jeopardy clause of Oregon's Constitution, Or. Const. Art. I, § 12, ("No person shall be put in jeopardy twice for the same offense"), the court's analysis and discussion was drawn almost exclusively from decisions of this Court interpreting the federal Double Jeopardy Clause.

In a subsequent case involving alleged misconduct by a court bailiff, *State v. Williams*, 48 Or. App. 319, 617 P.2d 629 (1980), the Oregon Court of Appeals declined to invoke the double jeopardy bar which was interposed by the state high court in *Rathbun, supra*. Indeed, in 'the court's discussion of the issue, it appeared to endorse the intentional misconduct thrust of *Jorn, Dinitz, et al:*

> "* * * Unlike the conduct in *Rathbun*, here the bailiff's actions were 'attributable to mere negligence.' 287 Or. at 434. The bailiff in the case was *not motivated by bad faith* and her conduct was not akin to 'the case *where the prosecutor or the judge intends to provoked a mistrial.*'" 48 Or. App. at 324, 617 P.2d at 632. (emphasis added).

"The general rule is said to be that the double jeopardy clause does not bar prosecution, '* * * where circumstances develop not attributable to prosecutorial or judicial overreaching, * * * even if defendant's motion is necessitated by a prosecutorial error.' *United States v. Jorn,* 400 US 470, 485, 91 S Ct 547, 27 L Ed2d 543 (1970). However, retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is 'motivated by bad faith or undertaken to harass or prejudice' the defendant. *United States v. Dinitz,* 424 US 600, 611, 96 S Ct 1075, 47 L Ed2d 267 (1976). Accord, *State v. Rathbun,* 37 Or App 259, 586 P2d 1136 (1978), *reversed on other grounds,* 287 Or 421, [600] P2d [392] (1979)." Petition for Certiorari, at 14; 49 Or. App. at 417-418, 619 P.2d at 949.

Nevertheless, the Oregon court misapplied the very principles which it espoused, stating:

"* * * [W]e are of the opinion that the prosecutor's conduct in this case meets one of the other forbidden criteria, *viz.,* overreaching. The comment occurred during the redirect examination of a key witness. The prosecutor's express intent was to rehabilitate the witness, who had been impeached. However, the commenting question went beyond rehabilitation and was, in fact, a direct personal attack on the general character of the defendant. As such, *we think the prosecutor is charged with the knowledge that the comment — which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought — was certain to interfere with the trial process.*" Petition for Certiorari, at 15; 49 Or. App. at 418; 619 P.2d at 949-950. (emphasis added).

The above passage reflects an almost cavalier

abandonment of the *Jorn/Dinitz* requirement that the prosecutorial misconduct be "intended to provoke a mistrial" or "motivated by bad faith." In its place, the *Kennedy* court substituted a mere showing of knowledge (chargeable to the prosecutor)[20] that the impropriety was "certain to interfere with the trial process." Recognizing that the requisite intent and bad faith motivation which it had disregarded were at the very heart of *Jorn* and its progeny,[21] the *Kennedy* court characterized the prosecutor's misconduct as "intentional, at least in the sense that it *appears* that it was made deliberately and after some thought." *Id.* (emphasis added).

Under the above language in *Kennedy,* a prosecutor's conduct resulting in a mistrial would invoke the double jeopardy bar to retrial merely if the court held the prosecutor chargeable with the knowledge that his or her error was "certain to interfere with the trial process" and if it appeared that the improper action was done "deliberately and after some thought." *Ken-*

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[20]The court did not specify by what means or under what guidelines a prosecutor would be held "chargeable" with such knowledge.

[21]As already pointed out in footnote 9, *supra,* the requirements of misconduct intended to provoke a mistrial or motivated by bad faith have been restated consistently, though in varying forms by the Court. Lower courts adhering to the majority view have stressed the intent or motivation element. For example, in *People v. Baca, supra,* 193 Colo. at 14, 562 P.2d at 414-415, the court noted:

> "Accordingly, while the nature and gravity of the error may be relevant to the motivation of the party committing the error, or may give additional weight to a finding of bad faith the crucial focus must remain upon that motivation."

nedy requires neither that the improper question be motivated by bad faith (indeed, it could be misguided but made in good faith), nor that the prosecutor have intended to cause the mistrial.[22]

The Oregon appellate court's analysis of another aspect of the prosecutorial misconduct/jeopardy issue was equally flawed. Having found the prosecutor chargeable with the knowledge that the comment she deliberately made was "certain to interfere with the trial process," the court concluded:

> "Defendant then was faced with a Hobson's choice — either to accept a necessarily prejudiced jury, or to move for a mistrial and face the prospect of being retried at a later time. There will be many circumstances in which the decision, in the face of this dilemma, to seek a mistrial will be deemed the equivalent of a waiver of a defendant's prior jeopardy rights. *See United States v. Jorn, supra,* 400 US at 485. However, this case of flagrant

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[22]The *Kennedy* rationale goes far beyond the "gross negligence" minority approach in two respects, since well-intentioned but erroneous misconduct susceptible to censure by the Oregon view would hardly comprise "gross negligence," notwithstanding the vagueness of the term, *cf. United States v. Fine,* 644 F.2d 1018, 1022, (5th Cir. 1981); and the court of appeals even expressed uncertainty as to whether the prosecutor's subjective intent "should necessarily play a pivotal role in the decision as to whether or not prior jeopardy forbids retrial." Petition for Certiorari, at 15 n. 1; 49 Or. App. at 418 n. 1; 619 P.2d at 949.

In contrast to the *Kennedy* version of intent necessary to find overreaching is the more common view articulated in *People v. Gomez, supra,* 84 Ill. App.3d at 788, 406 N.E.2d at 888:

> "To obtain the protection of the double jeopardy clause in a case such as this, the intent of the prosecutor in overreaching must be to obtain a premature termination of the proceedings by forcing the defendant to move for a mistrial. Unless the prosecutor's misconduct was a ploy to force the defendant to move for a mistrial, and thereby obtain an opportunity to prosecute the defendant a second time, overreaching to obtain a conviction, although not to be condoned, does not itself foreclose reprosecution."

overreaching lies outside that general rule. The facts require reversal of the defendant's conviction and his discharge on grounds of former jeopardy." Petition for Certiorari, at 15-16; 49 Or. App. at 418-419; 619 P.2d at 950.

The above reference to a "Hobson's choice" is an apparent allusion to this Court's treatment of that aspect of the mistrial/retrial issue in *United States v. Dinitz, supra.* However, in its exposition of the subject in that case, the Court dismissed "traditional waiver concepts" as inapplicable to the jeopardy situation. 424 U.S. at 609. *Dinitz* discounted the "Hobson's choice" analysis as nondispositive, stressing instead the defendant's retention of "primary control over the course to be followed in the event of such error." *Id.*

In sum, *Kennedy's* allusions to the pronouncements of this Court in *Jorn* and *Dinitz* are, at best, superficial. In reality, the decision runs completely afoul of both the history and philosophy underlying jeopardy principles applied to defense requested mistrials occasioned by prosecutorial or judicial error. Moreover, it all too eagerly invokes the Draconian sanction of a bar to retrial even for conduct which was not motivated by bad faith.[23] Finally, while clearly protective

[23]Such a harsh remedy clearly would "undermine rather than further the protection of the Double Jeopardy Clause," *cf. United States v. Dinitz, supra,* 424 U.S. at 610, since, if courts are too quick to find prosecutorial overreaching, the inevitable outcome would be an understandable reluctance by trial judges to grant mistrial motions even in appropriate cases. *Id.* at 610 n. 12. *See also United States v. Garza, supra,* 603 F.2d at 581. The interests of both the defendant and the public would thus be impaired by the needless and wasteful process of appeal and reversal employed as an artifice to avoid any jeopardy sanctions attendant to mistrials. *Cf. United States v. Tateo, supra,* 377 U.S. at 466. See discussion in text at pp. 35-36, *supra.*

of the defendant's "valued right" to the first tribunal, the decision seemingly ignores the "public's interest in fair trials designed to end in just judgments." *Wade v. Hunter, supra,* 336 U.S. at 689.

2. *Application of Law to These Facts*

The Oregon Court of Appeals' holding that retrial of this case was barred on double jeopardy grounds is erroneous by any standard of prosecutorial overreaching which the lower courts of this country had previously derived from the decisions of this Court.

The question which gave rise to defendant's motion for mistrial was clearly not asked with the intent to provoke a mistrial. The trial court so found; the court of appeals acknowledged that it was bound by the trial court's finding; and that finding is amply supported by the record.

Indeed, nothing in the record suggests otherwise. The question was asked early in the trial, during redirect examination of the third witness for the State. Defense counsel asserted, at the hearing on defendant's motion to dismiss, that the case "had gone very well for the defendant" up to the time the question was asked (J.A. 38; M. Tr. 7). However, the only substantive evidence that had been elicited at that point was the unequivocal opinion of the expert witness that a rug which defendant had claimed to own was actually purchased for the theft victim with the victim's money, testimony which hardly redounds to defend-

ant's advantage. The record suggests no obvious discrediting of the expert's qualifications or his opinion on cross-examination; nor does it suggest that the witness displayed a patent bias against defendant, although, of course, the question of bias had been raised. And, incomplete as the trial was, there is certainly nothing in the record to suggest that the prosecution had anything to gain by aborting the trial and starting over at the point when the mistrial was declared. The indicia of intent to cause a mistrial simply are not present here.

Furthermore, the record contains nothing which contradicts the prosecutor's representation that her question, although improper in form, was asked in the heat of trial, in a good faith[24] attempt to rehabilitate a State's witness after defendant had inquired into bias, and in the face of a series of defense objections of questionable merit.[25] Nor is there anything which contradicts her representation that her inappropriate phrasing of the question was simply the logical product of her awareness of what the witness' answer would be. In fact, these representations are corroborated by the vigor with which the prosecutor resisted both defendant's motion for mistrial and his

[24]Though not present here, "bad faith" conduct, in the abstract, is not enough. *Cf. United States v. Rios, supra,* 637 F.2d at 729-730.

[25]Like most states, Oregon holds that a witness who is impeached for bias may be rehabilitated by a showing of the reasons for any bias he may have. *See, e.g., State v. Lee,* 46 Or. 40, 79 P. 577 (1905); *State v. Warren,* 41 Or. 348, 69 P. 679 (1902). For cases of other jurisdictions, see footnote 26, *infra.*

subsequent claim of double jeopardy. The trial court was eminently entitled to find that the prosecutor's question was asked for a legitimate purpose and in good faith. A reviewing court, with only a cold record before it, is in a less satisfactory position to make such judgments; and therefore, in this context, deference to a trial court's findings is particularly appropriate.

To hold that the prosecutorial error here examined triggers a federal constitutional bar to reprosecution impinges adversely and perhaps unwittingly on other important substantive policies. Widely accepted evidentiary practices relating to the impeachment and rehabilitation of witnesses, founded not in the preservation of specific constitutional values but merely in the substantive and procedural criminal law of the states, will not be open to "back door" constitutional attack under the Double Jeopardy Clause.[26] This unwarranted assault on state policies is contrary to the

[26] Evidentiary procedures respecting impeachment and rehabilitation in many jurisdictions clearly permit questions which go well beyond the inquiry disallowed in this case. *See generally* 2 Wharton, Criminal Evidence § 495 (13th ed. 1972); *State v. Patterson*, 284 N.C. 190, 200 S.E.2d 16 (1973); *People v. Burke*, 52 Ill. App.2d 159, 201 N.E.2d 636 (1964); *State v. Crase*, 112 Kan. 486, 212 P. 81 (1923); *Crowell v. State*, 147 Tex. Cr. R. 299, 180 S.W.2d 343 (1944); *Meeker v. State*, 395 N.E.2d 301 (Ind. App. 1979). The federal courts which have considered the question are in accord. *See, e.g., United States v. Brown*, 547 F.2d 438 (8th Cir.), *cert. den.* 430 U.S. 937 (1977); *United States v. Kimbrough*, 528 F.2d 1242 (7th Cir. 1976); *Bracey v. United States*, 142 F.2d 85 (D.C. Cir.), *cert. den.* 322 U.S. 762 (1944); United States v. Panetta, 436 F. Supp. 114 (E.D. Pa. 1977), *aff'd.* 568 F.2d 771 (3d Cir. 1978). A small number of cases disapprove the practice. *See, e.g., Slagle v. State*, 39 Ala. App. 691, 108 So.2d 180 (1959); *Roark v. Commonwealth*, 206 Ky. 618, 268 S.W. 297 (1925); and *People v. Pierce*, 269 Cal. App.2d 193, 75 Cal. Rptr. 257 (1969). *But see, Goody v. City of El Cajon*, 223 Cal. App.2d 259, 35 Cal. Rptr. 896 (1963).

values of federalism and unnecessarily disruptive of the criminal trial process.

In the present case, by defendant's design, the jury was presented with express and implied evidence that the expert witness, Ewaldsen, was biased against defendant. The obvious implication was that the witness could not be trusted. This context explains the prosecutor's hardly uncommon dilemma, the circumstances under which the redirect examination was conducted, and the objective as well as the justification for her entire line of admittedly somewhat inartful questioning.

The prosecutor's question in this case was objectionable only because of its improper form, not because of its wholly permissible objective. No constitutional bar can be urged to the substance of what the witness would have related about the defendant's conduct or character, had a proper question posed the opportunity. Nor can it be questioned that cross examination by defense counsel made the subject relevant in the first instance. Yet under the theory of the court of appeals, the seven word interogatory of the prosecutor became not merely the occasion for a mistrial but a fatal bar to reprosecution altogether. The Double Jeopardy Clause should not be permitted to constitutionalize the intricacies of nonconstitutionally based state evidence law in this manner.

CONCLUSION

It is appropriate and desirable in this case for the Court to hold unequivocally that when a mistrial is granted on defendant's motion because of prosecutorial or judicial error, the Fifth Amendment jeopardy clause does not bar retrial unless the prosecutor's or judge's conduct was undertaken intentionally to provoke a mistrial. However, regardless of what standard this Court chooses to apply, the court of appeals erred in setting aside defendant's conviction on Fifth Amendment jeopardy grounds. The judgment of the Oregon Court of Appeals should be reversed.

Respectfully submitted,

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